No. 16334

United States Court of Appeals

FOR THE NINTH CIRCUIT

CANADIAN PACIFIC RAILWAY CO.,
a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Cross-Appellant,

v.

CANADIAN PACIFIC RAILWAY CO.,
a corporation,
Cross-Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE UNITED STATES OF AMERICA, CROSS-APPELLANT AND APPELLEE

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STATEMENT OF JURISDICTION

The jurisdiction of the court below was founded upon 28 U.S.C. 1333, and the Act of June 19, 1948, Chapter 526, 66 Stat. 496 (46 U.S.C. 740) by virtue of a libel (R. 3) in a cause of collision between a vessel and a submarine cable.

The jurisdiction of this court is founded upon 28

U.S.C. 1291, by virtue of a notice of appeal (R. 20) from the final decree (R. 19) below.

QUESTIONS PRESENTED

1. Whether the trial court findings of fault and causation were clearly erroneous;

2. Whether the trial court erred in admitting evidence of libelant's damages;

3. Whether the trial court erred in refusing to admit and in striking additional evidence of the damages awarded libelant, and

4. Whether the court erred in overlooking and failing to find further damages in the amount of $1,983.27 on the basis of uncontradicted testimony.

STATEMENT

Appellee (Libelant below) brought this action to recover damages to its submarine cable occasioned when appellant's vessel fouled said cable with its anchor during maneuvers attempting to dock said vessel at Pier 64, Seattle, Washington on March 21, 1955.

In March of 1955 and prior thereto appellee owned and maintained a submarine cable between Alaska Communications System facilities in Seattle and points north, the cable being part of a communications complex connecting Fort Lawton and Alaskan points with

the Seattle ACS facility in the Federal Office Building. (R. 37, 62) The cable commenced from the shore at Pier 57 and extended outward in a western direction at the bottom of Elliott Bay, its depth increasing as the bottom contours sloped downward to greater depths away from shore. (R. 37, Respondent's Exhibit A-1) The cable area was marked on navigation charts prepared and published by the United States Coast and Geodetic Survey (Respondent's A-1). During the period in question such charts were in publication and available to any at a price of $1.00, and said charts delineated the cable area out from the shore to a depth of approximately 180 to 197 feet, depicted thereon by red dotted lines marking said area for any who might be using ground tackle near the harbor facilities. (Respondent's A-1, R. 130, 131) Likewise, the cable area was marked by a large sign visible to mariners maneuvering in the vicinity of the harbor facilities located there and adjacent on either side. (R. 351-352)

On March 21, 1955, SS PRINCESS LOUISE, appellant's single screw passenger ship of some 4,000 tons and 320 feet in length, arrived in Elliott Bay and began maneuvers to land at Pier 64. (R. 39, 100, 101) While so engaged, without the aid of a tug, her approach attempt was seen to take her further south than usual, there being a southeasterly wind of 35 knots at the time. (R. 99, 100, 101, 102) During these ma-

neuvers she was seen to have her starboard anchor on the bottom and dragging, this latter fact being demonstrated by the angle or "scope" at which the ship's anchor chain stood out from the hawse. (R. 103, 104, 107, 108) Her attempt was to moor on the south and weather side of Pier 64. (R. 321) This is 800 feet north of the red line stub extending out from the shore to deep water and indicating the shoreward cable area within which appellee's submarine cable lay, as depicted on the Coast and Geodetic Survey Chart. (Respondent's Exhibit A-1) The ship is 320 feet in length, her hawse and anchor chain being at her bow extremity; the length of chain in the water at the time was 180 feet, (R. 325), the depth of water in the area being less than said length of anchor chain and decreasing toward the shoreline. (Respondent's Exhibits A-1 and A-10) The ship came well south of Pier 64 in order to make provision for the effect of the strong wind pushing her rapidly northward during her approach. (R. 101, 103, 106) She failed in her first attempt and backed out for a second try, still dragging her anchor, (R. 107, 329) and on her next attempt accepted the services of a tug, successfully completing her mooring at 3:48 P.M. (R. 323), an hour later than her scheduled docking at 2:45 P.M. (R. 341). Thus, SS PRINCESS LOUISE, at some time during the hour preceding 3:48 P.M., her docking time, was seen over the

cable area off Pier 57 and northward. (R. 102, 105, 42, 43, 51, 57) Her captain testified she backed out, worked upwind to the *southeast*, turned *left* from southeast to east and around until she was heading northerly (R. 325, 358-360), all the time towing her ton and a quarter anchor which had a shank of some 8 feet in length and 30 fathoms (180 feet) of chain in the water (R. 355, 325). The depth in the cable area vicinity where she was seen and where she turned, swinging left and closing inshore in her approach, was less than the reach of her anchor. (Respondent's Exhibit A-1)

Communication traffic and routine circuit tests on the ACS cable were made hourly between Alaskan stations and ACS facilities in Seattle. (R. 74-79) Communication had been routine until it was lost after 3:00 P.M. on March 21, 1955 when the last contact was had with Adak (R. 79-81) and was found inoperative at 4:00 P.M. when Kodiak could not get through to Seattle. (R. 82-84)

When the repair of the cable was undertaken on March 23, 1955 by appellee's employment of its cable repair ship M/V LENOIR (R. 230-234), the cable was picked up beginning at the shore end and was found damaged for a considerable distance, the damage increasing in intensity westward as the cable extended

into deeper and deeper water until it was found broken and dragged out of position at a depth of approximately 180 feet (30 fathoms). (R. 219-228, 238)

The inshore broken end was taken aboard in a position some 225 feet, or 75 yards, southerly from its original position as laid in 1953. (R. 301-303)

The cable repair ship LENOIR was occupied 6 days from 11:00 A.M., March 23, 1955 to 10:00 A.M., March 29, 1955, inclusive (R. 247) in accomplishing sufficient repair of the cable to provide the minimum service then required by appellee. (R. 240)

The per diem cost of operation of LENOIR to appellee was $1,500.00 per day, making her cost to appellee for cable repair work on this occasion 6 days at $1,500.00 per day, or approximately $9,000.00. (R. 164) The direct costs allocated to the repair job by the Alaska Communications System headquarters was $6,954.23, which figure, however, was not all inclusive. (R. 162, 188-189)

The court found that appellee's cable was lawfully located, its area properly posted and charted, the knowledge of which was chargeable to the master and those in charge of PRINCESS LOUISE on March 21, 1955; that PRINCESS LOUISE negligently employed her anchor in the vicinity of the cable area, and contacted, damaged and parted libelant's cable due to

failure to observe and maintain a position clear of the same, that appellee was damaged in the sum of $6,954.23 in direct costs for which appellant was liable (R. 14-17). The court, on September 15, 1958, decreed recovery to appellee in like amount. This appeal followed (R. 19-20).

The foregoing statement reflects the basis of appellee and cross-appellant's argument and specification of errors in limiting appellee's damages to $6,954.23, set forth as follows:

SPECIFICATION OF ERRORS

Appellee and Cross-appellant's Specification of Error No. 1:

The trial court erroneously failed to allow cross-appellant and appellee damages based on the daily operational costs of the appellee's cable repair ship for the period during which said ship was exclusively engaged in the cable repair occasioned by the negligent damaging and breaking of the Seattle-Fort Lawton submarine cable by appellant.

Specification of Error No. 2:

The trial court erroneously concluded that the only damages recoverable by cross-appellant and appellee was the sum of $6,954.23 incurred for cable repair work performed by cross-appellant — appellee.

Specification of Error No. 3:

The trial court erred in excluding and striking the Libelant's Exhibit 3, designated as the job order cost sheet.

ARGUMENT

I.

The Evidence Before the Trial Court Firmly Established Respondent's Liability.

Contrary to appellant's specifications of error, the evidence conclusively shows that SS PRINCESS LOUISE and those in charge of her were negligent in lowering her anchor out to 180 feet of chain in the water and dragging the anchor in the marked and posted cable area, that the cable was damaged and communications failed within the same hour as her negligent maneuver took place and that appellee's cable location was adequately marked.

1. The position of SS PRINCESS LOUISE in the cross-appellant's cable area was clearly fixed by the evidence. On March 21, 1955, SS PRINCESS LOUISE, a 4,000-ton single screw vessel of approximately 320 feet in length, owned by appellant (R. 35) arrived in the Seattle harbor and at about 3:00 P.M. was seen to be making her approach to her intended mooring at Pier 64. (R. 100) She was seen by an experienced

observer, Harbor Patrolman Langworthy, to make what he designated as her normal course into the harbor except that when she swung toward her pier, she came farther south than usual due to the force of the wind from the southeast. (R.101) This maneuver, including the observed track farther south than usual, was observed by the harbor patrolman between 3:00 P.M. and 3:30 P.M., when his view was cut off by his entry into his mooring at Pier 49. (R. 101) Since this observer was down harbor in West Waterway (Respondent's A-1) off the piers to the southwest of PRINCESS LOUISE's position (R. 106, 112), his angle of vision revealed her as being farther south than she normally was, but less accurately as to the distance, or feet. (R. 101, 102) He stated on direct examination (R. 102) that she turned left toward the piers in the vicinity of Piers 59 and 57, approximately *a tenth of a mile* off the pierhead line and farther south than he was accustomed to see her maneuver. (R. 102, 103) The witness described observing that PRINCESS LOUISE's starboard anchor was down at this time and that the anchor was dragging as demonstrated by the angle at which the chain extended from the hawse on the bow of the ship (R. 103, 104, 107) The witness further testified as to his familiarity with the area in which these maneuvers were observed to take place, that there was a sign posted in that vicinity warning of

the existence of the submarine cable and prescribing use of anchors (R. 104, 105), and that PRINCESS LOUISE was so engaged due west of Pier 57 during her turn. (R. 105)

Under rigorous cross-examination by appellant's proctor, the witness demonstrated his intimate familiarity with the waterfront, the piers and area in question, and his accurate powers of observation, awareness of locations and distances, his basis therefor, as well as his disinterested objective attitude. (R. 114 - 122) This witness noted the awkward plight into which PRINCESS LOUISE fell (R. 112, 120, 121) as a result of the imprudent nature of her mooring attempt from upwind of her intended dock. (R. 261-263) That his observations were clear and distinct and assisted by binoculars was established on cross - examination. (R. 126, 127) The red line and positions "P-1" and "P-2" on Respondent's A-1 were the witness's estimate of her position *after* the southerly approach, dragging anchor, and reflect her backing (R. 124, 125) out of the mess she got into by her negligent attempt to approach downwind without aid of a tug. The witness corrected a brief impression created by appellant's cross examination, that the anchor had been observed for the first time when dragging only some 50 feet off Pier 64: he stated he observed this earlier when she was heading southerly

and began to change her course and swing around to head for Pier 64. (R. 127) This, of course, occurred at the southernmost point of her approach, i.e., the farthest point upwind as she crossed the cable area while so using her anchor.

Another witness, Colonel George F. Rogers, who was then the executive officer in charge of the Seattle Alaska Communications System facility (R. 36) recalled seeing PRINCESS LOUISE in the vicinity of Pier 57 and the cable area (R. 38, 39), immediately becoming concerned over damage to the cable and calling his engineering department to expect trouble (R. 43). He testified to being in an excellent vantage point on the fifth floor of the Federal Office Building some 600 yards in direct line to the vicinity of the cable area off Pier 57 (R. 41), and some 300 yards in direct line to the pier itself.

The impact of his testimony, reiterated under questioning by the court and on cross-examination, was that he observed PRINCESS LOUISE some two ship lengths off Pier 57 (R. 41, 42), or 600 feet (R. 41, 58). Vigorous cross-examination confused the witness somewhat but he remained firm on his primary recollections, i.e., that A.C.S. had a cable area off Pier 57, that he saw the PRINCESS LOUISE in it with an

anchor out, and whether she was backing or had headway he didn't now know. (R. 51-52)

2. That the cable was properly laid within the marked area shown on charts in general distribution and use by mariners was also clearly shown by the testimony of Captain John Bowen, Master of the cable repair ship LENOIR. (R. 232, 285, 287, 306, 318) It was the northernmost of several laid in that area and extending westerly into deeper water. (R. 314) That it was hooked and damaged by a heavy object [the PRINCESS LOUISE's anchor (Finding VII)] is attested by the cable foreman, Mr. Christensen, who was in LENOIR's bows watching the cable as it came up over the reel during recovery of the damaged cable here in question (R. 219). That the cable, which had a tensile strength or breaking strength of 25 tons (R. 307), had been hooked and dragged out of its position of rest, was obvious by the abnormal condition observed at the sea wall or shore terminal where it was found to be stretched out tight to seaward (R. 237) instead of hanging straight down in its normal position. Mr. Christensen described it as "bar tight", too tight to remove without cutting. (R. 219-220)

Keeping in mind that the cable area was marked out to deep water — the boundary markers extending nearly 600 yards from the shore line along the north

boundary and well over 700 yards out from the shore line along the south boundary (Respondent's Exhibit A-1) and out to depths of 180 feet and 197 feet as shown on the same exhibit (Respondent's A-1) which was in publication and distribution in March of 1955 (R. 130), Mr. Christensen's testimony corroborates the mute evidence of the rigidly stretched cable at its shore connection (R. 219-220). He testified that from his vantage point at the bow where the cable came in over the reels approximately 1,500 feet were picked up and noted in ". . . fairly good condition, but from then on I observed that something had been dragging along the cable and had scuffed the outer jute . . ." (R. 220) In his response shortly after this question he stated the scuffing showed for ". . . I would say a thousand feet." (R. 221) Then approximately 500 feet from the end the cable showed severe scuffing with all the jute torn off, scarring the steel armor in the last 200 feet with shiny, fresh appearance to the broken end. (R. 221) (Repeated on cross-examination by respondent and examination by the court, R. 222-228) Now, simply adding the figures of 1,500 feet observed in fairly good condition, approximately 1,000 feet markedly scuffed, 500 feet sufficiently scuffed to tear off the jute and 200 feet with scarred steel, totals 3,200 feet which approximates the 3,450 feet figure testified to by Captain Bowen (R. 298, 308) as being

the length of the segment from the shore terminus at the sea wall out to the break. It is clear from the evidence that the first sign of damage, which grew progressively worse as the depth increased out to the broken end, was well within the cable area. The damage observed as commencing 1,500 feet out from the shore sea wall conclusively establishes that the cable was hooked by the PRINCESS LOUISE anchor well within the cable area and dragged along its length until, with the increase in depth while the scope or length of chain suspending the anchor and appellee's cable remained constant, the strain increased until the breaking point was finally reached during PRINCESS LOUISE's maneuver out to deeper water for another try at docking. There has been set forth ample basis for the trial court's findings in this respect and certainly that court's finding should not be disturbed in absence of clear error. *Portland Tug & Barge Co.* v. *Columbia River Towing Co.*, 153 F. 2d 237, cert. den., 328 U.S. 863; *Petrich* v. *Hansen*, 204 F. 2d 261 (C.A. 9); *Oaksmith* v. *Garner*, 205 F. 2d 262 (C.A. 9); *The San Francisco*, 172 F. 2d 767 (C.A. 9); *Heder* v. *U. S.*, 167 F. 2d 899 (C.A. 9); *Bornhurst* v. *U. S.*, 164 F. 2d 789 (C.A. 9); *Meintsma* v. *U. S.*, 164 F. 2d 976 (C.A. 9); *The Rocona*, 173 F. 2d 661 (C.A. 9); *Rogers* v. *Pacific Atlantic Steamship Co.*, 170 F.

2d 30 (C.A. 9); *Borcich* v. *Ancich*, 191 F. 2d 392 (C.A. 9).

Certainly the evidence in this case has established appellant's liability beyond that required to justify the trial court's findings relating to said liability. The evidence has shown the appellant's culpability with respect to the breaking of the cable to an extent seldom found in similar reported cases, lacking only an eye-witness to the undersea contact between the PRINCESS LOUISE's anchor and cross-appellant's cable to remove any doubt from the issue. The preponderance of the evidence, however, clearly establishes appellant's liability. *The PRINCESS ALICE*, 239 Fed. 587 (1917); *New Jersey Bell Telephone* v. *Standard Oil Company*, 88 F. Supp. 806 (1949); *New York Telephone Co.* v. *Cities Service Transp. Co.*, 23 F. Supp. 426 (1938); *The ELSIE*, 288 Fed. 575 (1923); *The VINDEGGEN*, 252 Fed. 209 (1918); *The City of Oakland*, 277 Fed. 969 (1922).

3. That the maneuver which resulted in this damage was imprudent and contrary to the normal good practice of seamen and was a negligent act is established by the expert testimony of Captain A. S. Howell. Captain Howell did not say it would be imprudent to use an anchor in a cable area — this is too basic to be an issue; he does testify that under the conditions pre-

vailing on March 21, 1955 he would "never get upwind on the dock . . . you can't control the ship that way". (R. 261) He stated he would not be able to handle the ship if an approach was made from the upwind or southerly side of the intended dock. (R. 262, 263) This agrees with the testimony of another disinterested witness and boatman, Mr. Langworthy, who observed the inability of those in charge of PRINCESS LOUISE to control her, (R. 120, 121) and which fact finally resulted in her belated use of a nearby tug (R. 356) to extricate her and to assist her back out into the harbor for a second try. (R. 107)

Further, the captain of PRINCESS LOUISE admitted he left his anchor out during not only the first attempt, but the second (R. 329, 330) because he "didn't see any point in heaving it in, as according to the depth of water shown on the chart and the position I was approaching from...." This in the vicinity of a cable area and which he knew was there. (R. 351, 352) Yet Captain Campbell had no bearings taken, plotted or recorded, nor did his officers make any observations of position. (R. 371, 372, 375) He fixed his position, that of a 320-foot single screw ship with an anchor out on at least 180 feet of chain, perhaps more, merely by eyeing Piers 63 and 64. (R. 344-346, 349) Nor did he take or cause to be taken any depth soundings to assist in determining his position during this time. (R. 360)

This at a time when he was in obvious difficulty in a rash attempt to land upwind from the dock in a southeast gale, making him about an hour late in docking, during which he rang down 44 engine orders, sometimes as many as 4 orders within a minute. (R. 352-354)

That PRINCESS LOUISE entered the cable area with her anchor dangling at the end of at least 180 feet of chain, on at least one occasion, is admitted by Captain Campbell, beginning at R. 358 where he stated he was underway, headed southeast for the Smith Tower (shown on Respondent's A-1), " . . . about 3 or 4 cables off the wharf . . . ." (600 to 800 yards off the wharf — either Pier 57 or Pier 64, probably Pier 57), going straight ahead (R. 358), then turning left and bringing a 320-foot ship around toward east and then northeast (magnetic) which the captain correctly testified was east-northeast true, making headway all the time and without taking any soundings. (R. 359-360) Plotting this on Respondent's A-1 will quickly show that at 600-800 yards off either Piers 57 or 64, heading southeast toward the Smith Tower and *turning left,* which is *east* and *inshore,* invasion by PRINCESS LOUISE of the marked cable area in depths of 180 feet or less was certain.

4. The record conclusively shows that PRINCESS LOUISE was in the marked cable area at the time when the subject cable was broken. The PRINCESS LOUISE succeeded in docking at 3:48 P.M. (R. 323) She was due to dock at 2:45 P.M. (R. 324). Between 2:45 P.M. and 3:48 P.M. she was engaged in the maneuver during which 44 engine orders were recorded (R. 356 and Respondent's Exhibit A-8, page for March 21, 1955). Until this period, communications between Seattle and Alaska Communications System facilities and Alaskan stations had been uneventfully carried out (R. 74-76, 79) and were recorded by the Kodiak ACS station hourly through 3:00 P.M. Seattle time (R. 74-75, 79). The next time Kodiak was due to be " . . . normally and invariably . . . . " contacted by Seattle was at 4:01 P.M. Seattle time when no signal could be heard (R. 82). The Kodiak station operator testified and his official record (Libelant's Exhibit 1) showed entries reflecting record of the fact that the submarine portion cable of the communications system was inoperative between Seattle ACS headquarters and Fort Lawton and became so at some time after 3:00 P.M. Seattle time when the last contact was made and before 4:00 P.M. when discovered and recorded by the Kodiak station (R. 82-84, 92, 94, 95). The service was restored by alternative leased land line facilities. (R. 83, 96, 62-63). Clearly, the trial court

did not err in finding as it did in Findings of Fact VII, XIV (R. 15, 17) as contended by appellant in its Specification of Error No. 2.

5. Nor did the trial court err in excluding the 1958 issue of a harbor chart marked for identification as Respondent Exhibit A-11. This exhibit was excluded on the basis of appellee's objection that it was a chart of conditions existing 3 years later, immaterial and incompetent. This was discretionary with the court, the exercise of which certainly was not and could not have been clear error. Even accepting appellant's argument that the cable area could have been marked into deeper water, and for all that — its whole underseas length — this surely would not prevent damage at the hands of those who blissfully ignore those markings and warnings. Drawing lines on charts out into water of greater depth will hardly prevent fouling a cable laid within those lines in shallower water, and is hardly analogous with putting covers over vats as proof of ability to safeguard persons from falling into the vats. Thus, *Carstens Packing*, 186 Fed. 50 (C.A. 9, 1911) is hardly in point, nor is *The Georgie*, 14 F. 2d 98 (C.A. 9, 1926), which involved particular application of a California statute. Here, *contra* to *The Georgie* situation, appellant had clear, unequivocal warnings on the charts of the area and by the large warning sign posted, and more important,

appellant's captain well knew of the existence of the cable area. (R. 351-352)

II

The Trial Court Erroneously Limited Appellant's Recoverable Damages to $6,954.23.

The appellant urges, in Appellant's Specification of Error No. 4 (Appellant's Brief, page 19) that the trial court erred in finding that the appellee "proved damages in the sum of $6,954.23, or in any other sum, and also erred in admitting and considering heresay evidence on the question of damages". The appellee agrees that the district court erred in fixing damages in this case, and further, urges that this court now increase the appellee's award of damages to the proper amount of $8,937.50, as contended for in the pre-trial order (R. 10, 11) and as shown by the record.[1]

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[1] Appellee's right to seek greater relief than it was granted below is not dependent upon the hollow common-law formalism of filing a second notice of appeal, the entire record coming to the Court of Appeals upon the original notice filed by appellant. *Standard Oil Co.* v. *Southern Pacific Company and Davis,* 268 U.S. 146 (1925); *The John Twohy,* 255 U.S. 77 (1920); *Reid* v. *James C. Fargo,* 241 U.S. 544 (1916); *The Hesper,* 122 U.S. 256 (1887). For this purpose, the appellee has an absolute right to rely upon the appeal taken by appellant and not to file notice himself. The John Twohy, supra. In particular, the successful libelant, as appellee, whose award has been brought up for review as here, is entitled to point out to the appellate court an erroneous omission from the award, and to have it increased to the proper amount, as shown by the record. *Standard Oil Company* v. *Southern Pacific Company and Davis, supra;* and *The Hesper, supra.* Appellee has properly given notice of its contentions by its Statement of Points filed in the case and by its Specifications of Errors in this brief.

During the trial of this case in the lower court, the appellee elicited testimony from an expert cost accountant for the Alaska Communications System showing that the direct costs of repair to the A.C.S.telephone cable attributable to the break of March 21, 1955, amounted to $6,954.23. (R. 161, 162, 185) The government's expert witness, Army Sergeant Charles B. O'Brien, who has had 20 years' experience in the accounting field as it pertains to public utilities (R. 150) explained on cross-examination that this figure included the sum of $504.00 for depreciation, and $188.20 for overhead, and that the direct out-of-pocket expenses for the cable repair job for the cable repair ship alone amounted to $6,262.03. (R. 188, 189)

The government's cost accountant was unable to state what all the "out-of-pocket" expenses for the cable repair operation were; he did testify that the direct expenses he attributed to the cost of operating the cable ship BASIL O. LENOIR during the cable repair job did not include any costs relating to the preparation of the cable ship for putting to sea for the particular operation. Similarly, said direct expenses did not include the direct overhead expense for the operator of the cable ship, the Alaska Communications System. (R. 189)

In order to prove more adequately the damages accruing to the government as a result of the Fort Lawton-Seattle submarine cable repair in March of 1955, Sergeant O'Brien was questioned on direct examination as to his knowledge of the daily cost of operation of the cable ship LENOIR. He testified that in November, 1954, five months prior to the subject cable repair job, he prepared a cost analysis of the daily operational cost of the LENOIR which daily operational cost figure did not include any item of profit or loss. (R. 163, 164) The daily operational cost of operating the cable ship was $1,500.00. (R. 164) Sergeant O'Brien prepared the cost analysis under orders from his commanding officer, for the purpose of determining the charter hire value of the vessel. (R. 166, 167) In arriving at the daily operational cost of the LENOIR, Sergeant O'Brien considered all items of expense necessary to operate this particular ship in a normal course of one day. (R. 170) These items included labor, fuel, oil, expendable supplies, depreciation, dry-docking, repairs and laundry. (R. 175) It also included the costs of preparing the cable ship for the repair job. (R. 194) Sergeant O'Brien detailed the source of his information concerning the computation of the various items thus included in his cost analysis. (R. 175-179) He prepared a subsequent cost analysis in May of 1955, two months after the subject

cable repair job, utilizing the same method of computation, and arriving at the same figure of $1,500.00 as the daily operational cost of the repair. (R. 179-180) The May, 1955 computation covered all the period from the preceding computation in 1954, and was reviewed after each month's operation of the LENOIR. (R. 180)

Captain John Bowen, the Master of the cable repair ship, testified that according to Respondent's Exhibit A-3 which is the log book of the LENOIR, the cable repair ship commenced on 1100 hours of the 23rd of March, 1955, and was completed at 1000 hours on the 29th of March, 1955. This represented an elapsed time of 5 days, 23 hours, during which the cable ship was used on the subject cable repair job. (R. 247) Thus, the evidence clearly demonstrates damages in the amount of $8,937.50, or $1,500.00 per day for a period of 5 23/24 days.

The government's cost accountant witness testified at length concerning his computation of the daily operational cost of the cable repair ship, including the source of the various items upon which he relied in making his computation. (R. 175-181) Counsel for respondent in the court below moved to strike all the witness's testimony relating to the daily operational cost computation on the ground that it was not the best

evidence, but the court received it over objection as a summarized statement of the information obtained and testified to by the witness as to conclusions given by him as an expert witness in the field of cost accounting. (R. 181, 184-185) This was clearly within the discretionary authority of the trial court. See Wigmore, 3rd Ed., Vol. II, Sec. 561 and cases collected therein. And such discretion has been specifically sustained in permitting the opinion evidence of an accountant. *United States* v. *Miller,* (C.A. 2, 1932) 61 F. 2d 947, 950; see also 3 Benedict on Admiralty, Sec. 381 b (6th Ed), p. 7.

While the trial court did, as appellant's brief insists, finally reject libelant's Exhibit 3, which was a ledger sheet showing the cost accountant's tabulation of the direct costs of the cable repair job (R. 152, 161-162), the trial court also properly admitted and considered the cost accountant's expert oral testimony relating to the direct costs of the cable repair job and the daily operational costs of cable repair ship. (R. 181, 184-185)

Sergeant O'Brien's testimony with regard to damages was uncontradicted. This was the sole and only testimony in the matter, and was in the nature of expert testimony of the libelant's cost accountant and was accepted by the trial court as such. The ledger

sheet, ultimately rejected as Libelant's Exhibit 3, was painstakingly qualified as a record made in the ordinary course of business (R. 152-153) and as an official government record (R. 153) and was also qualified as being the best evidence (R. 154), matters probably overlooked or lost sight of by the trial court during trial.

Appellant's argument under the caption "Specification of Error No. 4", on pages 35-37 of appellant's brief, directs itself to the trial court's rejection of libelant's Exhibit 3, and contends that the trial court only considered "oral testimony of a hearsay nature as proving damages". Of course, the trial court did nothing of the sort. It simply and properly received the oral expert opinion of the government's cost accountant witness as to the cost of the cable repair job. The direct cost of operating the cable repair ship on the subject cable repair job was given as $6,954.23, and the complete cost of said job, including the cost of preparing the vessel for the cable repair, as $1,500.00 per day. The oral testimony of the witness as to the various items considered by him in arriving at his conclusions respecting the operating costs of the vessel, were offered, and accepted, not as tending to prove the truth or accuracy of those items, but simply as demonstrating the grounds for the witness's opinion. See Wigmore, 3rd Ed., Vol. II, Sec. 562, Sec. 655.

Appellant's argument thus fails for the reason that the testimony of Sergeant O'Brien was admitted, not as hearsay, but as the expert opinion of a qualified cost accountant. But even if this were not so, it is hard to understand appellant's curious reliance upon the hearsay rule, a common-law exclusionary rule which experienced admiralty counsel are seldom heard to assert. The technical common-law rules by definition do not apply to a civil law admiralty case, and the objection of hearsay in evidence goes only to the weight of the evidence. 1 Wigmore on Evidence, (3rd Ed.) Vol. I, Sec. 4d; 3 Benedict on Admiralty (6th Ed.) Sec. 381b; *The Estrella*, 4 Wheat. 298, 306, 4 L.Ed. 574, 576 (1819); *The Denny*, 127 F. 2d 404 (3rd Cir.); *The Rosalia*, 264 Fed. 285, 289 (2nd Cir., 1920); *The Orion*, 239 Fed. 301 (4th Cir., 1916); *Westchester Fire Ins. Co.* v. *Buffalo Housewrecking & Salvage Co.*, 40 F. Supp. 378 (1914) A.M.C. 1601 (W.D.N.Y.); *Hickman, Williams & Co.* v. *Murray Transp. Co.*, 31 F. Supp. 820 (1940) A.M.C. 550 (S.D.N.Y.); *The Boskenna Bay*, 22 Fed. 662 (S.D.N.Y. 1884); *The Vivid*, 28 Fed. Cas. 1234, No. 16,978 (E.D.N.Y. 1870); *The J. F. Spencer*, 13 Fed. Cas. 614 No. 7,315 (E.D.N.Y. 1869).

Cross-appellant submits that a fair analysis of the cost accountant's testimony in this case, together with the other evidence establishing the duration dur-

ing which the cable ship was exclusively engaged in Seattle-Fort Lawton cable repair job, compels a conclusion that the trial court erred in failing to allow cross-appellant damages based on the daily operational cost of the cable repair ship, and in limiting damages in the amount of $6,954.23. Sergeant O'Brien's detailed testimony as an expert witness clearly established the daily operational cost of the cable repair ship at $1,500.00 per day; the testimony of Captain John Bowen, Master of the cable repair ship, shows that the vessel was engaged on the Seattle-Fort Lawton cable repair job from March 23rd, 1955 through March 29th, 1955 (R. 247), and respondent's Exhibit A-3, the pilot house log book of the cable repair ship which was offered and admitted into evidence (R. 194-195) shows in detail that the ship was used exclusively during that period in repairing the cable break.

The trial court accepted Sergeant O'Brien's oral testimony as to the direct costs of the cable repair, which amount Sergeant O'Brien testified was found by him to be $6,954.23, and awarded libelant below damages in that amount. The trial court rejected Sergeant O'Brien's oral testimony as to the daily operational costs in determining damages, presumably on the basis that such amount included costs which were not allowable, although the reason for the trial court's refusal to allow the indirect costs does not appear of record.

It is clear, however, that there was competent and sufficient evidence before the trial court to compel an award of damages based on the daily operational costs of the vessel in the amount of $8,937.50. This figure represented the exact cost of operation of the cable repair vessel to the libelant during the cable repair job. Clearly, the expenses directly connected with the cable repair are recoverable damages, and the cost of operating the vessel during the repair operation is such a direct expense. The fact that the vessel would have been maintained by the government without respect to this particular repair job does not affect the cost of operation as an item of recoverable damages. The rule is clearly stated in *United States* v. *The John R. Williams*, (C.A. 2, 1944) 144 F. 2d 451, 453 (cert. den., 65 S.Ct. 271). Judge A. Hand, in delivering the opinion for the court, concisely stated the point:

> "The appellant contends that the above three items all represent current expenses incurred by the government's cable repair vessel JOSEPH HENRY when engaged in repairing Cable No. 555, that these expenses during the period of the repair work were a necessary cost of maintaining a vessel which it regularly kept for repairing cables. The appellant showed that the repairing of the cable, which was injured by the tug, did not prevent the use of the vessel for other repair work and, therefore, added nothing to the libelant's necessary outlay. But, if the government had not maintained such a vessel it would have had to employ an outside contractor to make the

repairs. We can see no reason why the respondent, who caused the damage to the government's cable, should not pay the expense of the repairs while they were being made. Similar expenses were allowed by Judge Mack in the Commonwealth, D.C., 297 F. 651, and by the Circuit Court of Appeals of the Third Circuit in the A. A. Raven, 231 F. 380. See also The L-1 (The Philadelphia), D.C., 10 F. Supp. 43; The Conqueror, 166 U.S. 110, 134, 17 S.Ct. 510, 41 L.Ed. 937. The decisions where recoveries have been allowed for the use of spare boats maintained for emergencies, though such boats might not have been otherwise used at the time, support the libelant's claim. (citing cases)"

Similarly, we cannot see why the respondent below, who caused the damage to the government's Seattle-Fort Lawton cable, should not pay the expense of the repairs while they were being made, nor why the cost of operating the cable repair vessel should not be allowed as such an expense.

It is respectfully submitted, that on the basis of the record in this case, this court should now award cross-appellant damages commensurate with the proof in the case in the amount of $8,937.50.

SUMMARY

PRINCESS LOUISE attempted to dock without a tug under unfavorable conditions, proceeded to approach downwind dragging her anchor at the end of 180 feet of chain or more and, ignoring the known

cable area, was seen to drag the anchor in the vicinity of the cables in the marked and posted cable area. At or about the time of the attempt, appellee's cable service was disrupted, its submarine cable shortly thereafter found scored by the dragging of a heavy object, disturbed from its plotted and proper position, and freshly broken apart. Minimum repair requirements were accomplished using appellee's cable repair barge at an established per diem cost of $1,500.00 per day for 6 days; certain direct expenses were also the subject of expert testimony and amounted to $6,954.23, which was a lesser included figure in the contemporaneously derived per diem cost figure of $1,500.00.

Cross-appellant defends and seeks increased damages largely on the facts which are extensively disputed by appellant in its statement and argument, and which therefore required cross-appellant's extended attention in the foregoing brief. A review of the record and testimony in this respect discloses the complete lack of merit in appellant's position; nowhere has it been shown, nor can it be shown, that the trial court's findings of fact were *clearly erroneous*. Conversely, it has been shown from the record, that the trial court erroneously determined the libelant's recoverable damages in the court below.

CONCLUSION

For the foregoing reasons hereinabove detailed the decree finding liability on the part of appellant should be sustained, correcting only the award to conform to the appellee and cross-appellant's proofs, allowing the per diem cost of operation of the cable repair ship for the completion of the cable repair in 6 days less one hour, at a cost to cross-appellant of $8,937.50.

Respectfully submitted,

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